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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 151

AUSTIN HARRIS and JOSEPH LYLE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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OCTOBER TERM, 1966

AUSTIN HARRIS and JOSEPH LYLE,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Austin Harris and Joseph Lyle, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on March 25, 1966, and made final by an order of said Court, entered on April 19, 1966, denying a Petition for Rehearing filed by the Petitioners.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the judgment of conviction entered in the United States District Court for the Northern District of Illinois, Eastern Division, is as yet unreported, but is printed in Appendix I hereto, *infra*, p. App. 1.

STATEMENT OF JURISDICTION

Petitioners were convicted of the sale of heroin; the receipt, concealment and facilitation of the transportation and concealment of heroin; and conspiracy to receive, conceal, buy, sell and facilitate the transportation and concealment of heroin, in violation of Section 4705 (a), Title 26, United States Code and Section 174, Title 21, United States Code.

The judgment of the Court of Appeals affirming the judgment of conviction was entered on March 25, 1966. A timely Petition for Rehearing filed and thereafter, on April 19, 1966, denied.

The jurisdiction of this Court is invoked under the provisions of Section 1254(1), Title 28, United States Code.

QUESTIONS PRESENTED FOR REVIEW

1. Does the conspiracy portion of Section 174, Title 21, United States Code, prohibit an act or does it prohibit group associations? The statute unquestionably denounces the act of agreeing to commit a crime. May a court treat a conspiracy as though it were a group of people working toward a proscribed object such as the sale of narcotics?

2. Does one sale of narcotics by two men constitute a sufficient basis for inferring that an agreement existed between the sellers to cooperate with each other for whatever period one of the parties has, in the past dealt in this type of activity or for whatever period one of the parties may, in the future, continue to deal in this type of activity? In short, how far back and how far forward may a conspiracy, evinced by a single sale of narcotics by two persons, be assumed to extend from the pivotal act giving rise to the inference that the conspiracy existed?

3. Assuming that a conspiracy was not proved, does *Schaffer* v. *United States*, 362 U.S. 511 (1960), justify the affirmance of this case on the basis that the independent evidence of the separate transactions supports the convictions of the defendants on the substantive counts? More particularly, was the joinder of defendants proper and was the jury adequately cautioned so that there was no possibility that it considered evidence concerning one defendant in determining another defendant's guilt?

STATUTES INVOLVED

The relevant portions of the statutes claimed to have been violated, Section 4705 (a), Title 26, United States Code, and Section 174, Title 21, United States Code, are set forth in Appendix III, *infra*, p. App. 6.

Relevant portions of Rule 8, Federal Rules of Criminal Procedure, Title 18, United States Code, are set forth in Appendix IV, *infra*, p. App. 7.

STATEMENT OF THE CASE

On April 17, 1962, Agent Clarence Cook of the Federal Bureau of Narcotics met Richard Stepney, to whom he had been previously introduced by an informer, and drove with him to the vicinity of 47th and Lake Park on Chicago's south side. They had a conversation concerning the purchase of three "spoons" of heroin, after which Stepney left, as he said, to talk to his source of supply. (App. 16) Stepney entered a building on the corner and ten minutes later walked back to where Cook was parked and said that his source had only one spoon on hand and that if Cook purchased that he could return later that day and purchase all that he wanted. Cook asked to meet the source of supply and Stepney replied that he would talk to the man about it. The two drove to the rear of the building. After receiving $125.00 from Cook and having a further conversation about Cook's meeting the source of supply, Stepney entered the building. He returned fifteen minutes later and placed a package on the bannister of one of the rear porches. Cook retrieved the package which was later found to contain heroin. Before Cook left the area he saw the defendant Harris standing on the porch near the door where Stepney had previously entered the building. (App. 8-9; 16-17)

Later that same afternoon, Cook, the informer and Stepney again drove to the alley behind the aforementioned building. (App. 9) Cook told Stepney that he would not considered purchasing any additional heroin unless he met the source of supply. Stepney told Cook that "he was dealing with some very prominent people in the narcotics traffic, and also dangerous people, and that for this

reason his source of supply was not particularly interested in meeting any new people." (App. 18) Cook insisted and Stepney said he would talk to his source of supply again. (App. 18) Stepney entered the building, returned with Harris, and introduced him to Cook. The four men drove to a tavern where Harris told Cook that he was not in the habit of meeting strangers, but that since Cook had insisted he had agreed to meet him. When Cook indicated that he wanted assurance that he was dealing with a responsible person who would deliver good quality heroin, Harris said that he was associated with some very large people in the narcotics traffic and that Cook need not worry. (App. 10)

The four men then left the tavern. In the car Harris asked Cook how he liked the "stuff" he received earlier that day. Cook complained about the quantity and Harris replied that he would make up any shortage if Cook purchased additional heroin that day. After further conversation, Cook arranged to buy three "spoons" of heroin for $375.00. (App. 10-11) Cook gave Harris the money and then arranged for Harris to telephone him at a tavern on 70th Street. Harris said he would contact Cook at 8 p.m. that evening. (App. 11)

Cook waited at the tavern until approximately 9 p.m. when he saw a black, unmarked cab, driven by Lyle and occupied by Harris, drive by. Cook crossed the street to a hot dog stand where he was joined shortly by Harris who was afoot. (App. 11-12).

In the meantime other narcotics agents kept Lyle under surveillance. After Harris left the cab, Lyle drove down a nearby alley. He got out of the cab and walked to a nearby post; then he returned to the cab and drove to a spot near the hot dog stand. (App. 33)

While this was taking place Harris told Cook that his source of supply had decided that they would come and look Cook over instead of telephoning him. He then told Cook to go for a ride with him and to follow the black, unmarked cab. (App. 12) They followed Lyle in the cab to the alley from which Lyle had returned minutes earlier. Both cars stopped at the approximate location where Lyle had stopped before. (App. 33) At this point Lyle showed Harris, who in turn showed Cook, where a package containing narcotics was placed on a cement post. Then Lyle and Harris left in the cab. (App. 13)

Seven days later, on April 24th, Cook was standing in front of a cab company when Lyle came up and asked if he were looking for Harris. Cook replied that he was and Lyle told him to go to the tavern on 70th Street and he would contact him later that evening. (App. 13-14)

Lyle called at about 8:30 p.m. and said that if Cook wanted to purchase any "stuff" he should remain at the tavern. Thirty minutes later, Lyle entered the tavern and told Cook to get into a cab which was parked outside. Lyle came out of the tavern and entered the cab a few minutes later and the two drove off. Lyle then told Cook that he and Harris were partners and that while Harris was not around he would take care of Cook. Cook arranged to purchase of an ounce of heroin for $500.00 which he placed on the seat next to him according to Lyle's directions. Lyle drove Cook back to the tavern and instructed him to wait. Three hours later Lyle returned to the tavern and told Cook that he would find his "stuff" inside of a sock placed in the rear window of a cab parked near the corner. Cook left the tavern and recovered a package which examination later disclosed contained heroin. (App. 14-15)

REASONS FOR GRANTING THE WRIT

Former warnings by this Court that attempt to broaden "the already pervasive and wide-sweeping nets of conspiracy prosecutions" will be viewed with disfavor, (See, *Grunewald* v. *United States,* 353 U.S. 391, 404; *Krulewitch* v. *United States,* 336 U.S. 440, 445 (concurring opinion)), have not been heeded. In fact, the "net" has been cast in ever widening arcs until a conspiracy count now is a part of almost every criminal charge involving more than one defendant brought in the federal courts. So it was in the instant case, and the conspiracy charge here illustrates the claim that conspiracy is now dealt with as though it were a group of people rather than an act of agreement. *United States* v. *Borelli,* 2nd Cir. 1964, 336 F.2d 376, 384; "Developments in the Law—Criminal Conspiracy," 72 Harv. L.Rev. 922, 934. Consider the reasoning employed in the present case.[1]

A. The defendants Harris and Lyle jointly sold narcotics to Agent Cook on the night of April 17, 1962. Accepting this evidence, as we must, the conclusion naturally follows that Harris and Lyle conspired to sell the narcotics that were transferred at that time. *Cf. Cellino* v. *United States,* 9th Cir. 1960, 276 F.2d 941.

B. Stepney, who was not on trial with the defendants Harris and Lyle,[2] sold narcotics to Agent Cook earlier

[1] Giving, as we must, full credence to the evidence on behalf of the government *Glasser* v. *United States,* 315 U.S. 60.

[2] Stepney pleaded guilty to counts 1, 2, and 7 of the indictment prior to trial.

during the day of April 17, 1962. Harris was seen in the area immediately following the transfer of possession of the narcotics from Stepney to Cook. Following the transfer, and prior to the sale that evening, Harris discussed with Cook the quantity of the narcotics which he had received from Stepney. This, according to the Court of Appeals, was sufficient to raise the statutory presumption regarding unexplained possession and to involve Harris in a conspiracy with Stepney to sell narcotics. Although not directly explained in the Court's opinion, it was also sufficient to involve Stepney in the activities which took place later in the night. Thus possession, which gives rise to the statutory presumption which in turn establishes the "federal element" in a narcotics case—that the defendants *knew* that the narcotics had been imported into the United States contrary to law—is itself presumed by virtue of the conspiracy. See, *Hernandez* v. *United States*, 9th Cir. 1962, 300 F.2d 114. Lyle, wholly absent during the Stepney transaction, is linked to this sale, according to Court of Appeals, by subsequent events.

C. Lyle, without the assistance or proven knowledge of Harris (or Stepney), sold narcotics to Agent Cook on April 24, 1962. During this transaction, and as part of his "sales talk", Lyle told Cook that he and Harris were partners and that he would take care of Cook while Harris was not around. According to the Court of Appeals, this statement fixed Lyle's responsibility for Harris' participation in the sale by Stepney on April 17th, and thereby, since Harris was accountable for that sale, made Lyle equally accountable.

D. Harris' accountability for the April 24th sale is meanwhile fixed by his having cooperated with Lyle in the April 17th sale. Lyle's statement that he and Harris were

partners could, of course, not perform that function. *Glasser* v. *United States*, 315 U.S. 60, 74; *Minner* v. *United States*, 10th Cir. 1932, 57 F.2d 506.

If conspiracy is nothing more than a group of people, the foregoing logic is irrefutable. Because Lyle and Harris worked together on the night of April 17th, they are responsible for the individual activities, both preceding and following that date, of the other. The logical circle is free to expand as long as one member of the group continues to sell narcotics. There is no exit from the circle, nor limit to its scope, unless conspiracy is something more than a group of people. If it is, if conspiracy is actually an act of agreement, then the circle cannot grow except as the parties agree to make it grow. Harris could not be responsible for the sale on April 24th unless that sale were encompassed within his original agreement with Lyle. Lyle could not be responsible for Stepney's sale on April 17th unless that sale were encompassed within his original agreement—and that agreement would have to consist of more than the evidence of the second sale on April 17th—with Harris, even if it could be said that Harris was a party to that transaction. After all,

> "It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the understanding." *United States* v. *Crimmins*, 2nd Cir. 1941, 123 F.2d 271, 273; *United States* v. *Peoni*, 2nd Cir. 1938, 100 F.2d 401, 403.

The problems created by viewing conspiracy as a group rather than as an act of agreement are manifold. Two are well illustrated by the instant case. Primarily, there is an evidentiary problem. Thus, although Lyle was not

shown to have any contact with or part in the sale by Stepney to Cook he is saddled with responsibility for that sale, including Stepney's highly inflammatory statement that "*he was dealing with some very prominent people in the narcotic traffic, and also dangerous people* * * *" even though it is highly improbable that this statement could in any manner be interpreted as being in furtherance of the conspiracy. See, *Krulewitch* v. *United States,* 336 U.S. 440, 442-443; *United States* v. *Birnbaum,* 2nd Cir. 1964, 337 F.2d 490, 496. Harris, also prejudiced by this evidence, was, in addition, burdened with the responsibility for Lyle's sale to Agent Cook on April 24th.

The second problem, that of joinder, has, perhaps, greater significance to the overall administration of criminal justice in the federal courts. The Court of Appeals ruled here that

> "* * * even assuming that a conspiracy was not proved, the independent evidence of the separate transactions, under proper instructions from the trial court, supported the convictions of the defendants on the substantive counts. *Schaffer* v. *United States,* 362 U.S. 511, 516 (1960)."

In so ruling the Seventh Circuit has brought itself into direct conflict with the District of Columbia Circuit. Following the *Schaffer* decision, that Circuit, in *Ward* v. *United States,* D.C.Cir. 1961, 289 F.2d 877, decided that two defendants could not be joined for trial together by an indictment which charged that the first defendant committed an offense on one date, that both defendants committed a similar offense on a second date, and that the second defendant committed a third similar offense on a third date. The first defendant was prejudiced by the joinder of the third offense, *even though the defendant charged with that offense was acquitted of that charge,* because

> "* * * where multiple defendants are charged with offenses in no way connected, and are tried together, *they are prejudiced by that very fact,* and the trial judge has no discretion to deny relief." *Ward* v. *United States, supra,* at 878; *Ingram* v. *United States,* 4th Cir. 1959, 272 F.2d 567.

The Seventh Circuit could not accept the principle that Harris was prejudiced by evidence of Lyle's independent activities, and visa versa. It felt that there was no possibility that the jury had considered evidence concerning one defendant in determining the other's guilt; it felt that Stepney's inflammatory statement to Agent Cook, not made in the presence of either defendant, was not prejudicial. The feeling, the Court held, was justified by *Schaffer.*

There was, however, no possibility that the jury would consider evidence concerning one defendant in determining the guilt of other defendants in *Schaffer.* The conspiracy count was not submitted to the jury. The evidence was "carefully compartmentalized as to each" defendant as it was admitted. The evidence was received as applying only to a specific defendant and was shown to the jury "under painstaking instructions to that effect." The charge "meticulously set out separately the evidence as to each of the petitioners and admonished the jury that they were 'not to take into consideration any proof against one defendant and apply it by inference or otherwise to any other defendant.'" *Schaffer* v. *United States,* 362 U.S. 511, 515.

Unlike *Schaffer,* the jury in the instant case were told to consider all of the evidence against each of the defendants

if they found a conspiracy.[3] The jury were not told to ignore any facet of the evidence which they heard, except as they were told that each defendant was entitled to have his guilt or innocence determined from his own conduct "and from the evidence which applies to him as if he were being tried alone. * * *"[4] No explanation was given concerning which evidence applied to which defendant "as if he were being tried alone."

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[3] The jury were instructed that

"When two or more persons associate themselves together in carrying out a common plan, lawful or unlawful, there arises from the very act of associating themselves together for such a purpose a kind of partnership or joint venture in which each member becomes the agent of the other. So in a case where the evidence shows a common plan or arrangement between two or more persons, evidence as to an act done or a statement made by one is admissible against all, provided the act be knowingly done or the statement be knowingly made during the continuance of the arrangement between the parties and in furtherance of an object or purpose of the common plan." (App. 56)

* * * *

"When a person embarks upon a conspiracy, he may be held responsible for action taken by his co-conspirators which tend to further the common objectives as he understood them." (App. 57)

[4] Prior to instructing the jury, *supra*, the trial court instructed the jury as follows:

"Defendants have been charged with separate crimes in the various counts of the indictment. The jury should give separate consideration, and render separate verdicts with respect to each defendant, and to each count. Each defendant is entitled to have his guilt or innocence as to each of the crimes charged determined from his own conduct and from the evidence which applies to him as if he were being tried alone. If the jury finds that a defendant is guilty beyond a reasonable doubt of any one of the crimes charged in the indictment a verdict of guilty should be returned as to him. The guilt or innocence of any one defendant of any of the crimes charged should not influence the jury's verdicts respecting the other defendants. The jury may find any one or more of the defendants guilty or not guilty." (Tr. 449-451)

CONCLUSION

Mass trials are the anathema of any system of justice based upon individual responsibility. We have grown up with a heritage that a man is adjudged a criminal on the basis of his own acts, not on the basis of the acts of those with whom he associates. That is why legal tradition and the Statute treat conspiracy as an act of agreement and not as an interpersonal relationship. As long as the government insists in prosecuting individual wrongs as conspiracies in mass trials, as long as the court's interpret conspiracy as a relationship rather than as an act, there will be errors which the rules of evidence and the Federal Rules of Criminal Procedure were specifically evolved to obviate. This case vividly illustrates those errors. We pray that this Court recognize these errors, both conceptual and practical, and align the difference between the Seventh Circuit and the District of Columbia Circuit by reviewing this case.

Respectfully submitted,

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APPENDIX I

In the

United States Court of Appeals

For the Seventh Circuit

No. 15206 SEPTEMBER TERM, 1965 JANUARY SESSION, 1966

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
AUSTIN HARRIS and
JOSEPH LYLE,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 25, 1966

Before SCHNACKENBERG, CASTLE, and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* Austin Harris, Joseph Lyle, and two others were charged in an indictment with conspiracy to sell a quantity of heroin in violation of 21 U.S.C. § 174. They were charged in substantive counts with having sold narcotics on April 17, 1962 in violation of 21 U.S.C. § 174 and 26 U.S.C. § 4705(a). Additionally, Lyle and one Leroy Cates were charged with similar substantive offenses occurring on April 24, 1962.

A jury found both defendants guilty on all counts. The district court sentenced Harris to seven years and Lyle to twelve years imprisonment on each count, the sentences to run concurrently.

The defendants contend that the Government failed to prove the conspiracy charge, proving, rather, three separate sales of narcotics, one involving a transaction between and alleged co-conspirator, Richard Stepney, and narcotics agent Clarence Cook, another involving a transaction between defendants Harris and Lyle and agent Cook, and a third transaction between Lyle and Cook. The defendants argue that they were prejudiced by the admission into evidence of these "unrelated" sales.

A brief resume of the testimony demonstrates that the defendants' contention has no merit.

Agent Clarence Cook of the Federal Bureau of Narcotics met Richard Stepney through an informer on April 16, 1962. The next day the agent arranged to buy a "spoon" of heroin from him and asked to meet his source of supply. Stepney replied that he would have to talk to his "man" about it. Stepney, the informer, and Cook drove to an apartment on Lake Park Avenue near 46th Street in Chicago. Cook gave Stepney $125 and Stepney entered the rear of the building. He returned shortly and placed a package on the bannister of one of the rear porches. Cook retrieved the package, which was later found to contain heroin. Before Cook left the area he saw Harris standing on the rear porch near the door where Stepney had previously entered the building.

In the afternoon of the same day, agent Cook, the informer, and Stepney again drove into the alley behind the building. Cook told Stepney that he would not buy any more heroin unless he met the source of supply. Stepney entered the building, returned with Harris, and introduced him to Cook. The four men went for a drive during which time Harris asked Cook how he liked the "stuff" he had

received earlier that day. After further conversation, agent Cook arranged to purchase three "spoons" of heroin for $875. After giving Harris the money, Cook was asked where he could be contacted. Cook gave Harris the telephone number of a tavern on 70th Street. Harris said he would contact Cook about 8 p.m. that evening. Cook went to the tavern and waited until about 9 p.m., when he saw a black, unmarked cab pass by. Harris was sitting on the passenger side and Lyle was driving. Agent Cook crossed the street to a hot dog stand where he was joined shortly by Harris, who was afoot. In the meantime other narcotics agents had placed Lyle under surveillance. After letting Harris out near the tavern, Lyle drove into a nearby alley. He got out of his cab and walked to an area near a concrete post. He returned to his cab and drove to a point near the hot dog stand. About this time Harris told Cook that his source of supply wanted to look him over. He asked Cook to go for a ride with him and to follow the black, unmarked cab. They followed the cab to the alley from which it had just returned. Harris got out of Cook's car and walked to the rear of the cab. Lyle got out of the cab, pointed to a tinfoil package on the cement post, and said, "There's the stuff over there. Let's get out of here." Harris told Cook, "There's your stuff," walked to the cab, and left with Lyle. Cook retrieved the package, which was later found to contain heroin.

On the evening of April 24, 1962, agent Cook again met Lyle. Lyle asked if he were looking for Harris. Cook said yes. Lyle told Cook to go to the tavern on 70th Street, that he would contact him later. About 8:30 p.m. Lyle called Cook at the tavern and said that if he wished to buy any "stuff" he should remain in the tavern. About 9 p.m. Lyle entered the tavern and told Cook to get into the cab which was parked outside. Lyle then came out and drove off with

Cook. Lyle told him that Harris and he were partners and that while Harris was not around, he would take care of Cook. Cook arranged to buy an ounce of heroin for $500. Lyle told Cook to place the money on the seat of the cab. He then drove Cook back to the tavern. About three hours later Lyle came to the tavern and told Cook that he would find his stuff inside a sock in the rear window of a cab parked near the corner. Cook left the tavern, entered the cab, which was driven by Leroy Cates, and found the sock containing a tinfoil package. Later examination disclosed that the package contained heroin.

The foregoing evidence clearly established a single conspiracy to sell narcotics in which both Harris and Lyle participated. Harris' implication in the sale on April 17, 1962 by Stepney to Cook was shown by his presence at the scene following the sale and by his later inquiry of agent Cook about the quality of narcotics purchased. On the same day, Harris negotiated another sale to agent Cook and together with Lyle delivered the heroin. A few days later, Lyle sold agent Cook some additional narcotics, at which time he assured Cook that Harris and he were partners. This evidence was sufficient to show that Harris and Lyle were in business together in the sale of narcotics. Accordingly, all of the evidence could properly be considered against both defendants as to the conspiracy count. But even assuming that a conspiracy was not proved, the independent evidence of the separate transactions, under proper instructions from the trial court, supported the convictions of the defendants on the substantive counts. *Schaffer* v. *United States,* 362 U.S. 511, 516 (1960).

The judgments of conviction are affirmed.

APPENDIX II

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

Tuesday, April 19, 1966

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

United States of America, *Plaintiff-Appellee,* vs. Austin Harris and Joseph Lyle, *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 15206

It Is Ordered by the Court that the petition for a rehearing of this cause, filed by defendants-appellants herein, be, and the same is hereby Denied.

APPENDIX III

Section 174, Title 21, United States Code:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned * * *."

Section 4705, Title 26, United States Code:

> "(a) General requirement.—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

APPENDIX IV

Rule 8, Federal Rules of Criminal Procedure, Title 18, United States Code:

* * * *

"(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1331

AUSTIN HARRIS AND JOSEPH LYLE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. I) is reported at 358 F. 2d 279.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1966, and a timely petition for rehearing was denied on April 19, 1966 (Pet. App. II). The petition for a writ of certiorari was filed on May 18, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioners' convictions on the conspiracy count of the indictment.

2. Whether the charges against petitioners should have been severed for trial.

STATEMENT

After a trial by jury in the Northern District of Illinois, petitioners were convicted under a seven-count indictment (D. App. 2-6)[1] charging substantive narcotics violations and conspiracy. Counts I and II charged Richard Stepney with offenses committed on April 17, 1962; Counts III and IV charged petitioners with offenses committed later the same day; Counts V and VI accused petitioner Lyle of committing similar offenses on April 24, 1962; and the last count charged petitioners and Stepney with conspiracy to commit the substantive crimes charged in the preceding six counts.[2] Harris was sentenced to imprisonment for seven years on each of the three

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[1] In addition to the petition with its appendix, a copy of Appellants' Brief and Appendix in the court of appeals and a copy of the Brief and Appendix for Appellee in the court of appeals have been filed with the Clerk of this Court. These documents are referred to herein as "D. App." and "G. App." respectively.

[2] The indictment originally also included charges against Leroy Cates in counts V and VI and in the conspiracy count, but these charges were dismissed before petitioners' trial (D. App. 28 and 53). Stepney pleaded guilty to Counts I, II and VII prior to trial (Pet. 7, n. 2).

counts in which he was involved, the sentences to run concurrently, and Lyle received concurrent sentences of twelve years on each of the five counts in which he was involved (G. App. 1a-3a).

At trial it was shown that on April 17, 1962, Agent Clarence Cook of the Federal Bureau of Narcotics met defendant Stepney through an informer (D. App. 18) and purchased a "spoon" of heroin from him. Cook saw petitioner Harris standing nearby (D. App. 9). That afternoon, while negotiating a second purchase of narcotics, Cook told Stepney he would not buy any more heroin unless he met the source of supply (D. App. 17). Stepney replied that he was dealing with some very prominent and dangerous people in the narcotic traffic, and that his source of supply was not particularly interested in meeting anyone new (D. App. 18). Stepney, however, who had earlier referred to Harris as his source (D. App. 28), did introduce Cook to Harris. During the ensuing conversation, Harris asked the agent how he liked the "stuff" delivered earlier that day. Cook replied that the quality was good, but that he did not get a full spoon (D. App. 10). Harris said that if Cook bought more heroin that day, he would make up for the shortage in the first spoon (D. App. 10). Harris assured Cook that he was associated with "large people" in the narcotics traffic (D. App. 10). A deal was made for three more spoons for which Cook paid. That night—April 17—Harris and Lyle made delivery (D. App. 11-13).

Cook saw Lyle one week later at the cab company where Lyle worked and where Cook had been told that Harris could be reached (D. App. 12, 26). Lyle arranged to meet Cook that evening. At that time, he told Cook that he and Harris were partners and that while Harris was not around he would take care of Cook (D. App. 13-14). Cook then bought an ounce of heroin from Lyle (D. App. 14-15).

ARGUMENT

1. The evidence established a conspiracy embracing both petitioners and Stepney. Harris' participation in a conspiracy with Stepney was shown by his appearance on April 17 at the time of the first sale to Cook by Stepney and by his offer to Cook later that day—after Stepney had introduced Harris to Cook as Stepney's source—to make good a shortage in the earlier sale. Lyle's participation in the conspiracy was shown by his joint delivery with Harris on April 17 of the narcotics sold by Harris to Cook earlier that day and by Lyle's explicit admission to Cook one week later of a partnership with Harris in the sale of narcotics. Harris also stated to Cook that he was associated with others in his illegal activities, and there was sufficient independent evidence of a conspiracy between Harris and Lyle to make Lyle's admission of a partnership between them admissible against Harris. *Glasser* v. *United States*, 315 U.S. 60, 74.[3] Fi-

[3] Similarly, Stepney's statement to Cook about his dealing with prominent and dangerous people in the drug traffic was admissible against both petitioners. This was a statement in furtherance of the conspiracy, designed to assure Cook of the integrity and reliability of the source of narcotics.

nally, in addition to the evidence of conspiracy, there was unquestionably ample evidence against each petitioner under the substantive counts to support the concurrent sentences imposed.

2. Since the conspiracy was proved, the joinder of defendants and substantive counts was proper. In all events, the joinder here was proper because of the close relationship between the three sales and the joint participation of the petitioners in the second sale. The second sale was plainly the direct outgrowth of the first sale, and in the third sale Lyle told Cook that he was substituting for Harris—who had negotiated the first two sales—in his absence. Thus, the relationship among substantive offenses required by *Schaffer* v. *United States*, 362 U.S. 511, and *Ward* v. *United States*, 289 F. 2d 877 (C.A. D.C.), upon which petitioners rely, was satisfied here. The instructions of the court (D. App. 55-58), moreover, fully protected the right of each petitioner to be tried for his own conduct on the evidence applicable to him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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